

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARTURO B. DOMINGUEZ and DEPARTMENT OF THE AIR FORCE,
SAN ANTONIO AIR LOGISTICS CENTER, San Antonio, TX

*Docket No. 01-308; Submitted on the Record;
Issued April 12, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant has greater than a 22 percent impairment of a left leg condition for which he received a schedule award.

The Office of Workers' Compensation Programs accepted appellant's May 8, 1970 work-related injuries of a herniated disc pulposus at L4-5 and chronic low back pain and, on July 19, 1989 accepted his subsequent May 18, 1989 claim for left knee strain.

On January 8, 1990 and again on November 1, 1991 appellant filed a claim for a schedule award.

By letter dated November 6, 1991, the Office requested an impairment rating from appellant's treating physician and noted that it was "obliged to correlate recommended percentages of impairment to the third edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*."¹

In a report dated November 19, 1991, Dr. Salvador Baylan, appellant's treating physician and Board-certified in physical medicine and rehabilitation, stated:

"Based on the A.M.A., *Guides*, [appellant] does have an 11 percent impairment of the lower extremities. He does have only 125 degrees of flexion with [0] degrees extension lag. [Appellant] does have, however, pain as well as weakness of the left knee. This will give him a 20 percent impairment of the lower extremities. This impairment of the loss of motion and loss of strength as well as pain involving the knee added together shall yield a 31 percent impairment of the

¹ The Board notes that the proper edition for schedule award evaluations at that time was the A.M.A., *Guides*, third edition, revised. That edition was to be used for schedule awards determined between September 1, 1991 and October 31, 1993. FECA Bulletin No. 91-27; *John Yera*, 48 ECAB 243 (1996).

lower extremity. This could be converted to 12 percent impairment of the whole person.”²

In a report dated February 25, 1992, Dr. Baylan stated that appellant had significant weakness of the quadriceps and hamstring muscles. He noted that, “The muscle power is in the neighborhood of four by five secondary to pain” and that “There is also radiation of the pain distally involving the foot and ankle.” He rated appellant’s pain at a 7 on a scale of 1 to 10.

In a report dated March 25, 1992, Dr. Robert S. Meador, an Office medical adviser who is Board-certified in internal medicine, relied on Dr. Baylan’s data and found that appellant had an 11 percent impairment based on loss of motion of the knee, that loss of strength based on the femoral nerve was 30 percent, loss of strength due to nerve supply to the hamstrings was 5 percent and graded appellant’s loss of strength as a class 2 with a 20 percent loss of strength. He then calculated that 30 percent (femoral nerve) of 20 percent was 6 percent and 20 percent of 5 percent (hamstrings) was 1 percent for a total of a 7 percent impairment based on loss of strength. Based on Dr. Baylan’s description, he calculated pain of the femoral nerve at 5 percent. Dr. Meador found that this equaled a class 3 pain, which provided a maximum of 60 percent for pain. 60 percent of 5 percent equaled 3 percent impairment for femoral nerve pain. Dr. Meador then combined 11 percent for loss of range of motion, 7 percent for loss of strength and 3 percent for pain to arrive at a 19 percent impairment for the left lower extremity.³

By decision dated April 3, 1992, the Office awarded appellant a 19 percent impairment for his left leg injury of May 18, 1989, which would run from November 19, 1991 to December 6, 1992. Appellant retired on March 3, 1994.

On February 6 and September 1, 1998 appellant filed a claim for an additional schedule award.

In a letter dated September 16, 1998, the Office requested Dr. Baylan to provide an opinion concerning appellant’s lower back condition “which may be impairing one or both lower extremities.” The Office also requested that he render an impairment rating of the lower extremities.

In a report dated October 27, 1998, Dr. Baylan stated that appellant had a 17 percent impairment for the whole person. He found a 10 percent impairment for lumbar spine disorder, 4 percent for limited range of motion of the lumbar spine, 1 percent for lower extremity impairment and 3 percent for leg length discrepancy.

On February 5, 1999 Dr. Henry B. Mobley, an Office medical adviser and Board-certified in internal medicine, reviewed appellant’s record and provided an impairment rating of 22 percent for the left lower extremity and a 0 percent impairment for the right lower extremity. Based on Dr. Baylan’s data, Dr. Mobley found unilateral spinal nerve root impairment at L4-5 and S1 at 5 percent for each nerve root with motor impairments of 34 percent, 37 percent and 20

² Dr. Baylan did not refer to a specific edition of the A.M.A., *Guides*.

³ Dr. Meador relied on the third edition of the A.M.A., *Guides*.

percent for each nerve root and, when combined, resulted in a 3 percent impairment to the left lower extremity.⁴ He then found that motor deficit impairment for each root resulted in a 20 percent impairment.⁵ Based on the Combined Values Chart,⁶ Dr. Mobley provided an impairment rating of 22 percent for the left lower extremity. He stated that the date of maximum medical improvement was October 27, 1998, the date of Dr. Baylan's evaluation.

In a worksheet dated February 18, 1999, the Office noted that appellant had been awarded a 19 percent schedule award for his left lower extremity and was recently reevaluated at 22 percent impairment due to his lumbar (back) condition and that, therefore, appellant was entitled to an additional 3 percent impairment rating based on his left lower extremity.

In an internal Office memorandum dated February 18, 1999, the Office doubled appellant's May 8, 1970 low back injury and aggravation of his herniated disc pulposus with his May 18, 1989 left knee injury. The Office noted that appellant was paid a schedule award of 19 percent for his left lower extremity impairment from November 19, 1991 to December 6, 1992.

By decision dated February 23, 1999, the Office awarded appellant an additional three percent impairment to the left lower extremity. The Office noted that appellant had been paid a schedule award for 22 percent for his left lower extremity and this 3 percent increase reflected a "total of 22 percent for the left lower extremity."

By letter dated December 15, 1999, appellant, through counsel, requested reconsideration. Counsel argued that the Office, by doubling appellant's claims, compensated appellant only three percent more for his back and related medical problems.

In support of his request, appellant submitted reports from Dr. Baylan dated September 19, 1989, August 20, 1990 and September 24, 1991. In those reports, Dr. Baylan noted that appellant needed new orthopedic shoes, that he was symptomatic with pain in the lower back and left leg and that a magnetic resonance imaging scan revealed evidence of a L4-5 left hemilaminectomy discectomy, disc desiccation, anterior herniation, with posterior herniated disc pulposus on the left.

In a report dated March 24, 1999, Dr. Robert P. Morales stated that he examined appellant and opined that his low back pain symptoms were the result of low back pathology.

On March 6, 2000 the Office again referred the case to Dr. Mobley, the Office medical adviser, for an impairment evaluation.

In a report dated March 8, 2000, Dr. Mobley noted that appellant had two schedule award determinations and that "There is overlap in these two determinations and in the last one (based upon a report from Dr. Salvador P. Baylan), the physician did not mention the knee in his

⁴ A.M.A., *Guides*, (4th ed. 1993) 130, Table 83.

⁵ *Id.* at 49, Table 12.

⁶ *Id.* at 322.

evaluation.” He recommended referral to a specialist for an impairment evaluation, who should be aware of appellant’s knee and back conditions.

On March 24, 2000 the Office referred appellant, his case record and a statement of accepted facts to Dr. Joe G. Gonzales, a second opinion physician and Board-certified in physical medicine and rehabilitation, for an impairment rating.

In a report dated April 18, 2000, Dr. Gonzales stated that he had examined appellant and provided a 20 percent impairment of the left lower extremity. He stated that upon examination, there were no subjective symptoms and no objective findings to suggest the presence of a left lumbosacral radiculopathy that would adversely affect his left lower extremity. Dr. Gonzales added:

“Utilizing the A.M.A., *Guides* (4th ed. 1993) there is no applicable left lower extremity impairment based on lumbosacral or peripheral neurological deficits as currently nonexistent and the left knee has normal range of motion (0 degrees to 110 degrees). Therefore, no specific impairment to the left lower extremity is applicable. However, based on his diagnosis of “arthritis” of the left knee, which was a direct result of his trauma sustained on approximately May 18, 1998, he does qualify for a 20 percent impairment of the left lower extremity based on Table 62, p 80 and supported by recent x-rays which describe moderate degenerative changes of the medial compartment.”

In a report dated June 22, 2000, Dr. Ronald H. Blum, an Office medical adviser, reviewed the case record and stated: “Due to an inability in combining previous impairment determinations, the claimant has been examined by Dr. Gonzales for a second opinion. His report is well documented and his descriptions and reasoning support his recommendations.” Dr. Gonzales noted that, “for loss of cartilage interval, left knee, Table 62, p. 83, apparently 2 millimeters” provides a 20 percent impairment rating. He noted that there were no subjective or objective findings in the lower extremities to support impairment. Dr. Blum noted that appellant’s date of maximum medical improvement was reached on October 27, 1998.

By decision dated July 10, 2000, the Office denied appellant’s request for reconsideration on the grounds that the evidence of record failed to establish that he had greater than a 22 percent impairment for the left lower extremity for which he received a schedule award.

The Board finds that appellant has not established entitlement to an impairment award greater than 22 percent for his left lower extremity for which he received a schedule award.

Section 8107 of the Federal Employees’ Compensation Act⁷ provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function. Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal

⁷ 5 U.S.C. § 8107.

justice for all claimants the Office has adopted the A.M.A., *Guide* as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁸

In this case, appellant was awarded a 19 percent schedule award for an impairment to his left leg based on his May 18, 1989 work-related injury. The Office subsequently awarded appellant an additional three percent impairment for his left lower extremity on February 23, 1999. However, none of appellant's medical evidence supports an award greater than 22 percent for his accepted injuries. For example, Dr. Baylan's September 16, 1998 report provided an impairment rating of 17 percent for the whole person based largely on impairment ratings for his back. However, neither the Act nor its implementing federal regulations provides for a schedule award for impairment to the back or to the body as a whole.⁹ Furthermore, the back is specifically excluded from the definition of "organ" under the Act.¹⁰ Thus, Dr. Baylan's report is of diminished probative value.

Nonetheless, Dr. Mobley, the Office medical adviser, in a February 5, 1999 report, relied on Dr. Baylan's data to provide an impairment rating of 22 percent for his left lower extremity. An Office medical adviser's opinion may constitute the weight of the medical evidence where an attending physician has provided a description of physical findings. However, if the percentage estimate is not in accordance with the A.M.A., *Guides*, it must be sufficiently detailed to be accorded such weight.¹¹ Dr. Mobley relied on the data from Dr. Baylan and properly referred to the appropriate edition of the A.M.A., *Guides* in providing his impairment estimate of a 22 percent impairment rating. Indeed, the Office's second opinion physician, Dr. Gonzales, examined appellant and provided only a 20 percent impairment rating, as did the Office's subsequent Office medical adviser, Dr. Blum.

Inasmuch as appellant has failed to establish an entitlement to greater than a 22 percent schedule award for his left lower extremity, he has failed to meet his burden of proof and the Office's July 10, 2000 decision is affirmed.¹²

⁸ *Carolyn E. Sellers*, 50 ECAB 393 (1999).

⁹ *James E. Mills*, 43 ECAB 215 (1991); *James E. Jenkins*, 39 ECAB 860 (1988).

¹⁰ *Id.*

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.7(g) and (h) (April 1993).

¹² In his appeal, appellant argues that the Office doubled appellant's claims and thus denied him a schedule award for his back and related medical problems. As stated, the Act does not provide a schedule award for the back. Further, the Office "doubles" claims for administrative purposes only. In this case, the Office doubled appellant's claims because the same physician was treating appellant for more than one injury, that the cases would be handled by the same claims examiner and that an award had been made to an extremity which was claimed in both claims.

The July 10, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
April 12, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member